

# **Review of Jefferson County Contract Defender System**

The Texas Indigent Defense Commission performed a fiscal monitoring review of Jefferson County in August 2010. The fiscal monitoring review identified the use of a felony contract defender system in which a contract attorney in the Criminal District Court would initially be appointed to a case but would be replaced at a later time if the case moved to the trial docket. This matter was brought before the Commission's Policies and Standards Committee on June 6, 2011. The Committee discussed the matter but did not reach any resolution regarding the use of this issue. Subsequently at a meeting of the full Commission on December 1, 2011, a motion passed that directed staff to perform an onsite review of the contract defender system in Jefferson County.

The focus of this review was limited to the felony appointment process in Jefferson County as it relates to the contract defender system used by the district courts. We did not review the other elements of the Fair Defense Act such as the distribution of appointments, the methods for making misdemeanor appointments, or the methods for making juvenile appointments. Commission staff examined numerous case files and interviewed several court and county personnel and criminal defense attorneys. Staff identified three key issues: 1) Replacing contract counsel with trial counsel; 2) Process for determining indigence; and 3) Removal of attorneys when defendants bond. The following is an overview of the relevant felony appointment processes in Jefferson County. Staff seeks guidance on whether these processes comport with the requirements of the Fair Defense Act.

Felony arrestees in Jefferson County are booked at the central jail and are typically given magistrate warnings the day after arrest. Arrestees may request counsel at the Article 15.17 hearing. If an arrestee requests counsel, the request is noted. If an arrestee does not request counsel, this is also noted. The counsel coordinator immediately appoints contract or assigned counsel for all felony arrestees whether or not counsel was requested. If the arrestee bonds before the coordinator sends a standard attorney-client letter to the jail (informing the arrestee of the appointment), the appointment is withdrawn. In these cases, the counsel coordinator writes on the appointment form that the arrestee bonded. The Jefferson County indigent defense plan requires at magistration that there be a determination of the defendant's financial condition. The plan uses net income and whether a defendant is a recipient of federal welfare aid as the criteria for indigence. No determination of a defendant's financial condition occurs at magistration.

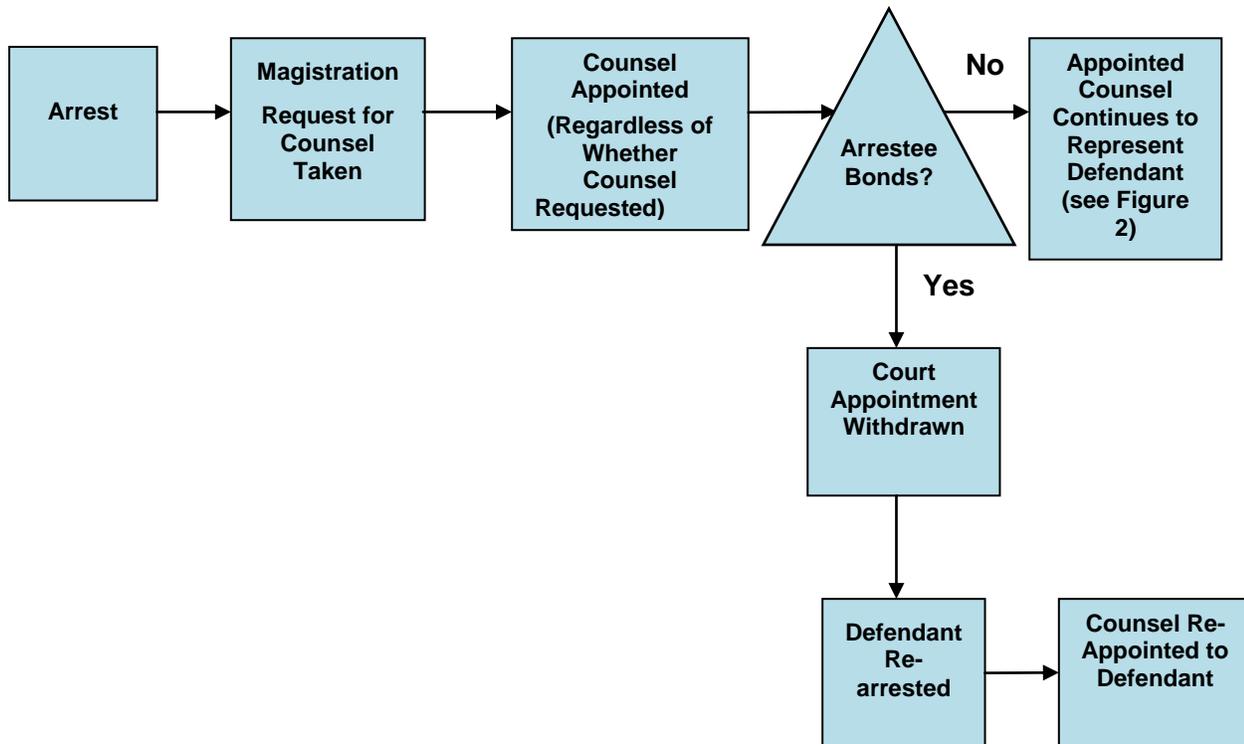
Each of the three district courts utilizes contract defenders in different ways. When an arrest is made, the counsel coordinator designates each case for a specific court. At this stage, cases have not generally been filed in the district clerk's office. The courts are not aware of case designations at this initial stage, but courts are assigned cases in order to ensure that each court's form of representation is provided to arrestees within the time frames set by Article 1.051 of the Code of Criminal Procedure. The counsel coordinator selects attorneys for specific cases in a rotational manner based on the court and that court's methods for utilizing contract defenders and assigned counsel. Each contract defender has a contract to represent defendants in a specific court, and contract defenders do not take appointments across multiple courts.

The Jefferson County District Attorney's Office has a policy that if an arresting officer has not sent the offense report to the District Attorney's Office within three working days of arrest, the arrestee is released on a personal recognizance bond. Many arrestees are initially booked into the jail and are released either by quickly posting bond or by receiving a personal recognizance bond if the offense report has not been sent to the District Attorney within this time frame. Once an arrestee posts bond, the

arrestee is deemed not to be indigent (although the court may later determine that a bonded person is indigent). Any previous appointments of counsel are voided. The person is then re-arrested when the indictment is filed. If the person has not retained counsel by the time of the re-arrest, he/she is re-assigned the attorney initially appointed to the case.

If a defendant makes bond, indigence may be determined at the initial court appearance after a case is filed.

**Figure 1: Flowchart describing processes from arrest until appointment of counsel**



**Issue 1: Replacing contract counsel with trial counsel**

**Applicable facts from site visit:**

Each of the three district courts in Jefferson County utilizes contract defenders, but each does so in a different way.

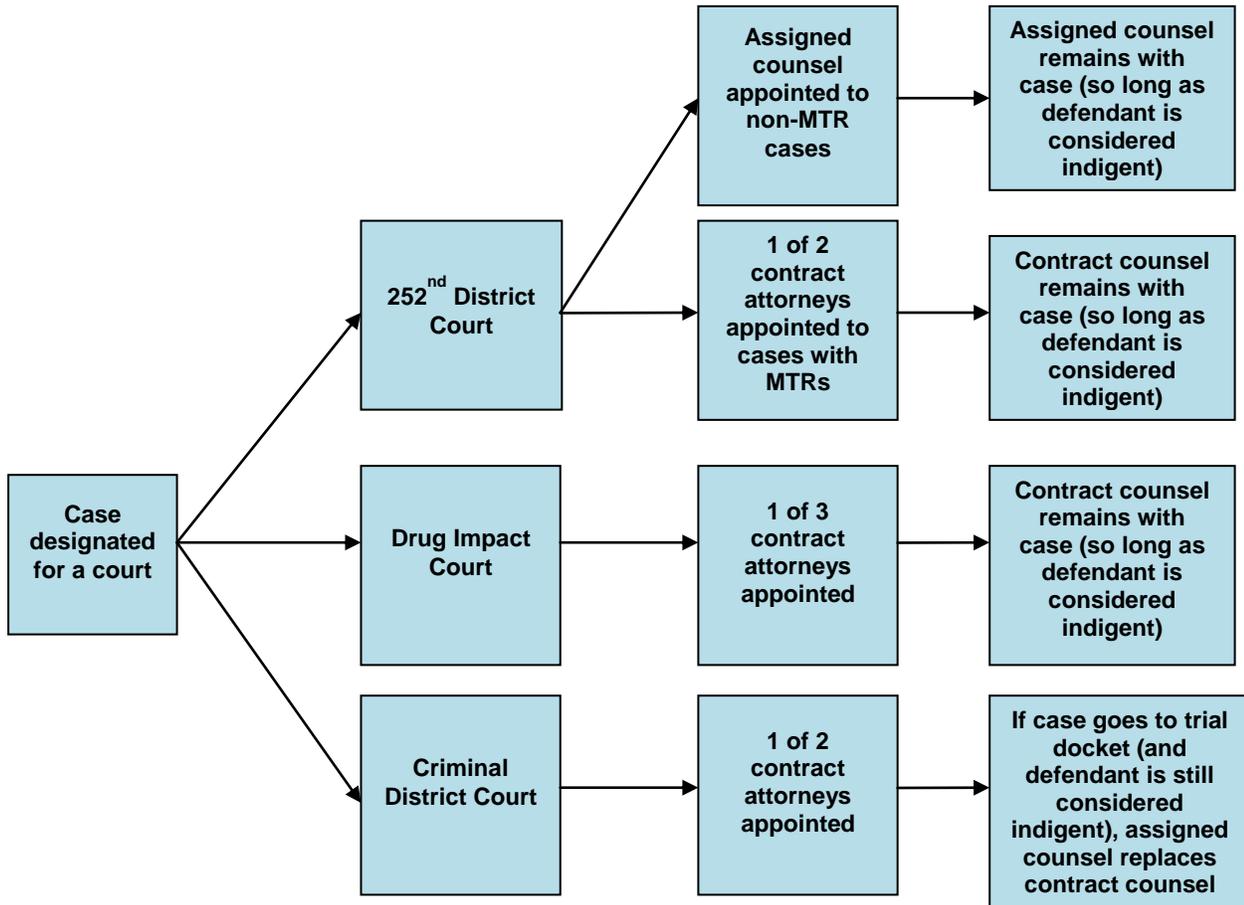
The **252<sup>nd</sup> District Court** generally assigns cases to assigned counsel rather than contract defenders. Two different contract defenders take cases that involve motions to revoke probation as well as new offenses that may relate to the decision to revoke probation. Regardless of whether a contract defender or assigned counsel is appointed to a case, counsel generally stays with the case through disposition.

The **Drug Impact Court** handles various types of drug cases that would otherwise go to the 252<sup>nd</sup> and Criminal District Court dockets. Three different contract defenders handle all indigent defense representation in the Drug Impact Court. Attorneys in this court handle cases through case disposition.

The **Criminal District Court** uses two different contract defenders for cases initially assigned to indigent defendants. If a quick disposition is not likely, and the case needs to be moved to the trial

docket, new counsel is appointed to the case. The new appointment is not to a contract defender but to an attorney from the assigned counsel list. According to contract attorneys in the court, they dispose 75% to 80% of the cases to which they are originally assigned. The remaining cases involve a substitution of counsel from contract counsel to assigned counsel. Staff did not find notes showing good cause for relieving the appointed contract attorneys when cases moved to the trial docket.

**Figure 2: Counsel Appointment methods used in each district court**



**Relevant cases / statutes regarding replacement of counsel:**

Tex. Code Crim. Proc. art. 26.04(j)(1)-(2):

An attorney appointed under this article shall:

- (1) make every reasonable effort to contact the defendant not later than the end of the first working day after the date on which the attorney is appointed and to interview the defendant as soon as practicable after the attorney is appointed;
- (2) represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel for the defendant **after a finding of good cause is entered on the record;**

Tex. Code Crim. Proc. art. 26.04(k): A court may replace an attorney who violates Subsection (j)(1) with other counsel. A majority of the judges of the county courts and statutory county courts or the

district courts, as appropriate, trying criminal cases in the county may remove from consideration for appointment an attorney who intentionally or repeatedly violates Subsection (j)(1).

*Stearnes v. Clinton*, 780 S.W.2d 216, 221–22 (Tex. Crim. App. 1989). Once established, the attorney-client relationship between an accused and his attorney should be protected by the courts without distinction as to whether the attorney is retained or appointed. The court found “the power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel at his discretionary whim.”

*Buntion v. Harmon*, 827 S.W.2d 945, 949 (Tex. Crim. App. 1992). A trial judge does not have the discretion to replace appointed trial counsel over counsel and defendant’s objections without some principled reason apparent from the face of the record.

*Roberson v. State*, 879 S.W.2d 250, 252 (Tex. App.—Dallas 1994, pet. Ref’d) (emphasis in original) (citing *Buntion v. Harmon*, *infra*). Where counsel is not *replaced*, a magistrate does not err in permitting an attorney to *substitute* for counsel of record where the defendant agrees to the substitution and the attorney of record does not object.

In *Brown v. State*, 182 S.W. 3d 427 (Tex.App.-Texarkana 2005), Defendant Brown plead guilty to felony theft and unauthorized use of a motor vehicle. The defendant’s court appointed counsel was not present at the sentencing hearing; so, new counsel was substituted over the defendant’s objection. The trial court overruled the defendant’s objection to the sentencing proceeding without the presence of her previous court-appointed attorney. The appellate court concluded, “The appointment of new counsel over Brown’s objection, and without first finding Brown’s original counsel had a conflict of interest or was no longer competent to represent Brown” constituted an error by the trial court.

### **Findings/Recommendations:**

**Finding 1:** Contract attorneys in Criminal District Court representing indigent defendants are replaced without a finding of good cause entered on the record.

**Recommendation 1:** As required by Article 26.04(j)(2), appointed attorneys must represent their clients until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered to withdraw as counsel for the defendant after a finding of good cause is entered on the record. Furthermore, findings of good cause must be in line with Texas statutes and case law.

## **Issue 2: Process for determining indigence**

### **Applicable facts from site visit:**

From our interview with the counsel coordinator, the coordinator stated that following magistrations each morning, everyone initially receives counsel whether counsel was requested or not. However, if a defendant bonds before she logs the appointment, then she does not log the appointment or send the defendant a letter notifying him/her of the appointment.

If the defendant requests counsel, he/she must sign a form stating that he/she is without means to employ counsel. However, after the Article 15.17 hearing, there is no screening of a defendant’s financial circumstances to determine if the defendant meets the standards for indigence listed in the indigent defense plan. When the defendant comes to court after a case has been filed, each court may conduct its own financial screening.

**Relevant statutes / indigent defense plan:**

Tex. Code Crim. Proc. art. 26.04(l): Procedures adopted under Subsection (a) must include procedures and financial standards for determining whether a defendant is indigent. The procedures and standards shall apply to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail.

Tex. Code Crim. Proc. art. 26.04(m): In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

**Jefferson County District Courts Indigent Defense Plan**

- i. An accused is presumed indigent if any of the following conditions or factors are present:
  - 1. At the time of requesting appointed counsel, the accused or accused's dependents are eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing;
  - 2. The accused's net household income does not exceed 100% of the Poverty Guidelines as revised annually by the United States Department of Health and Human Services and published in the Federal Register; or
  - 3. The accused is currently serving a sentence in a correctional institution, is currently residing in a public mental health facility, or is subject to a proceeding in which admission or commitment to such a mental health facility is sought.
  
- ii. An accused who does not meet any of the standards above shall nevertheless be considered indigent if the accused is unable to retain private counsel without substantial hardship to the accused or the accused's dependents. In considering if obtaining private counsel will create a substantial hardship, the appointing authority shall take into account:
  - 1. the nature of the criminal charge(s),
  - 2. anticipated complexity of the defense,
  - 3. the estimated cost of obtaining competent private legal representation for the matter(s) charged;
  - 4. the amount needed for the support of the accused and the accused's dependents;
  - 5. accused's income,
  - 6. source of income,
  - 7. assets and property owned,
  - 8. outstanding obligations,
  - 9. necessary expenses,
  - 10. the number and ages of dependents, and
  - 11. spousal income that is available to the accused.
  
- iii. Factors NOT to be considered in determining indigence:
  - 1. The accused's posting of bail or ability to post bail may not be considered in determining whether the accused is indigent.
  - 2. The resources available to friends or relatives of the accused may not be considered in determining whether the accused is indigent.

- iv. Only the accused's financial circumstances as measured by the financial standards stated in this rule shall be used as the basis for determining indigence.

**Findings/Recommendations:**

**Finding 2:** The process for determining indigence in Jefferson County does not comport with Article 26.04(l) of the Code of Criminal Procedure or with its own indigent defense plan. Article 26.04(l) requires that determinations of indigence apply to each defendant equally, whether the defendant bonds or remains in custody. The local indigent defense plan states that the financial standard for determining indigence is based on whether a defendant's net income is less than 100% of the federal poverty guidelines or whether a defendant receives aid from certain federal welfare programs.

**Recommendation 2:** Determinations of indigence must follow the process described in the Jefferson County indigent defense plan, which provides that only the accused's financial circumstances as measured by the financial standards stated in the plan are to be used as a basis for determining indigence. In order to implement this recommendation, the County will need to put in place a system to screen individuals for indigence earlier in the process.

**Issue 3: Removal of attorneys when defendants bond**

**Applicable facts from site visit:**

From our review of case files, staff found several cases where counsel was appointed, the defendant bonded, and upon re-arrest, the defendant was re-appointed the initial counsel. (See Appendix A for details.) The second appointment of the attorney indicates that the original appointment was no longer valid. When the defendant bonded, the order appointing counsel often stated, "BONDED". The files did not show any evidence of further work by the attorney. During district court dockets staff observed that many bonded defendants who had been previously assigned counsel were expected by the courts to retain counsel.

Several attorney letters to their clients stated that if an indigent client bonds that the client is no longer indigent. One example letter stated, "If you do have the money to pay for posting bond and attendant matters, it will be necessary for you to hire counsel since you are not in fact indigent." (See Appendix B.) These letters indicate that appointed counsel does not continue to represent the client if the client makes bond.

**Relevant statutes:**

Tex. Code Crim. Proc. art. 26.04(l): Procedures adopted under Subsection (a) must include procedures and financial standards for determining whether a defendant is indigent. The procedures and standards shall apply to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail.

Tex. Code Crim. Proc. art. 26.04(m): In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

Tex. Code Crim. Proc. art. 26.04(p): A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in

the defendant's financial circumstances occurs. If there is a material change in financial circumstances after a determination of indigency or non-indigency is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination.

**Findings/Recommendations:**

**Finding 3:** Jefferson County's practice of removing counsel if bond is made does not comport with Article 26.04(m) or with Article 26.04(p) of the Code of Criminal Procedure. Article 26.04(m) disallows the courts from considering whether the defendant has posted bond, except to the extent that it reflects the defendant's financial circumstances. Article 26.04(p) presumes that persons determined to be indigent remain indigent unless there is a material change in the defendant's financial circumstances.

**Recommendation 3:** As required by Article 26.04(p) of the Code of Criminal Procedure, the County must implement procedures so that a defendant who is determined to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless there is a material change in the defendant's financial circumstances.

**Appendix A – Cases with Multiple Appointments to Same Attorney**

Case Number	Court	Defendant Initials	Date	Activity
11025	252nd DC	WSH	12/23/10	appoint Kevin Cribbs
			1/14/11	arrest
			2/10/11	indictment
			3/11/11	second appointment of Kevin Cribbs
11181	252nd DC	AMH	2/12/11	arrest
			2/13/11	appoint Ryan Gertz
			3/1/11	bond
			3/3/11	indictment
			4/11/11	re-appoint Ryan Gertz
11942	252nd DC	MLV	6/9/11	indictment
			7/8/11	arrest
			7/9/11	appoint Charles Rojas
			7/30/11	bond
			8/15/11	re-arrest
			8/16/11	re-appoint Charles Rojas
			9/9/11	retained Harold Laine
12057	252nd DC	OM	4/7/11	arrest
			4/8/11	appoint David Grove
			6/23/11	indictment
			7/9/11	re-arrest (Defendant seems to have bonded, but there is no record in case file)
			7/10/11	David Grove re-appointed
10950	Crim. DC	WJT	1/18/11	arrest
			1/19/11	appoint Sonny Cribbs
			1/27/11	indictment (Defendant seems to have bonded, but there is not record in case file)
			1/28/11	Sonny Cribbs re-appointed
			2/12/11	bond
			3/23/11	Sonny Cribbs relieved
11307	Crim. DC	CKT	12/31/10	arrest
			1/1/11	appoint Sonny Cribbs
			3/17/11	indictment
			3/17/11	re-appoint Sonny Cribbs (Defendant seems to have bonded before the indictment)
			4/29/11	appoint Mike Laird

Case Number	Court	Defendant Initials	Date	Activity
10841	Drug Impact Ct.	TJB	11/10/10	appoint Mike van Zandt
			11/15/10	arrest
			11/22/10	bond
			1/13/11	indictment
			1/28/11	attorney relieved (Defendant bonded)
			2/7/11	Mike van Zandt re-appointed to case
10958	Drug Impact Ct.	NLT	1/2/11	appoint Mike van Zandt
			1/27/11	indictment
			11/9/11	arrest
			11/10/11	Mike van Zandt re-appointed to case
12134	Drug Impact Ct.	DRH	6/7/11	arrest
			6/8/11	appoint David Barlow
			6/24/11	bond
			6/30/11	indictment
			9/6/11	David Barlow re-appointed

## Appendix B – Sample Attorney-Client Letter

To:

Case(s)

I have been appointed as your counsel of record in the captioned cases, and it will be helpful to the defense of your case if you will observe the following general instructions.

1. **WITNESSES** It is very important that you inform me of the names and addresses of any witnesses that will be beneficial to your defense as early as possible. Please fill out the form at the bottom of this sheet completely and return to me by mail as soon as possible. It is generally not effective to call witnesses that will testify to irrelevant matters or who will testify to facts that help the State obtain a conviction, so please review the names carefully before submitting names.
2. **FACTS** Please also fill in your version of the facts in your cases, whether good or bad for your defense. It is important that you notify me of any harmful evidence so we may prepare as best possible and not be surprised. Please let me know if you believe any witnesses, including police officers, are going to lie about you or the facts, and what you believe they are going to say.
3. **MOTIONS** It is generally not helpful for you to prepare or file your own motions. I prepare and file motions I believe appropriate, and sometimes file them on the day of trial in order to avoid giving the State any added advantage unless required to do so by law or local rules.
4. **JAIL VISITS** I represent a large number of citizens accused of crimes and must make ample use of my time in visiting inmates; please do not request numerous unnecessary jail visits since I obtain most of the information I need in our initial meeting or meetings with my investigators.
5. **CORRESPONDENCE** It is helpful for you to correspond *with me* regarding the facts in your case, so please feel free to write to me. If there is additional information I need, I will contact you. It is harmful to your defense for you to write to the District Attorney since the prosecutors can and will use your correspondence against you if there is any way they can. Anything you write to the Judge in your case is also a matter of public record and the prosecutor may use confessions or other damaging information you place in the Court's file against you.
6. **BONDS** I am appointed to defend you in your case, and not to be your general lawyer. My appointment is based upon your representation that you are indigent and have no money. If you do have the money to pay for posting bond and attendant matters, it will be necessary for you to hire counsel since you are not in fact indigent. My services for posting bonds are limited to my retained clients and are not available to appointed clients on a free basis.
7. **CONFIDENTIALITY** Our communications are privileged and cannot be used against you. "Jail talk" such as discussing your case with other inmates is not privileged and can be used against you. The State has on occasion used other inmates as witnesses based upon what was said in the jail, so it would serve to your benefit to discuss your case with no other persons.